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SUPREME COURT U. S.

No. 139

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

WILMINGTON STAR MINING COMPANY, *Plaintiff in Error,* *vs.* **MINNIE FULTON,** *Defendant in Error.*	In Error to the Circuit Court of the United States, for the Northern District of Illinois.

PETITION FOR REHEARING.

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GUNTHORP-WARREN PRINTING CO., CHICAGO

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PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

We respectfully pray the court to reconsider its decision in this cause in so far as it holds that the trial court committed reversible error in overruling the motions of plaintiff in error to strike out the second, third and sixth counts of the declaration and in refusing to instruct the jury that no recovery could be had under any of these counts.

It is the common practice of the courts of Illinois under like circumstances to deny such motions and to

refuse similar instructions requested in cases tried in our courts, and the Supreme Court of Illinois has uniformly held that such action of the trial court was not error, if there was one good count in the declaration upon which the verdict of the jury might be predicated.

Under point 1 of our original brief (page 7) we cited Section 57 of the Illinois Practice Act, Chap. 110, Rev. Statutes, which provides that:

> "Whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts in the declaration be sufficient to sustain the verdict."

Under point 3 (original brief, page 17) we cited authorities to the effect that the decisions of the highest court of a state construing a statute of such state are conclusive and as binding as the text of the law. Under point 1 (original brief, page 8) we drew the attention of the court to Section 114, U. S. Compiled Statutes, title, "The Judiciary," which provides in substance that the federal courts shall conform to the practice of the state courts in cases other than equity and admiralty cases.

We respectfully direct the attention of the court to the following cases decided by the Supreme Court of Illinois which we believe fully support our contention that the trial court did not commit reversible error in refusing to instruct the jury to disregard the second, third and sixth counts of the declaration herein. These cases hold that it makes no difference whether the counts complained of were so defective as to be incapable of proof or whether the evidence simply failed

to support the allegations contained in certain good counts. *If there are one or more good counts which were sufficiently proved, that is enough to support the verdict.*

In the very recent case of *C. W. & V. Coal Co.* v. *Moran,* 210 Ill., 9, 16, the declaration consisted of five counts. On page 16 the court says:

> "There were instructions offered by the defendant and refused, severally applicable to each count, and stating that the plaintiff could not recover under such count, and they were all refused. *There was no evidence tending to sustain the fourth and fifth counts,* but the first three counts each stated a good cause of action, and there was evidence tending to sustain them. The court might properly have given the instructions relating to the fourth and fifth counts, but *inasmuch as the first three counts each stated a cause of action and the evidence was applicable to them, the refusal of the instructions as to the fourth and fifth is not ground for reversal.*"

In the case of *B. & O. S. W. Ry. Co.* v. *Keck,* 185 Ill., 400-402, the declaration consisted of six counts. The plea of general issue was filed and at the close of the evidence the defendant presented to the court six instructions, one directed to each count, instructing the jury to disregard it. These instructions were refused and the refusal is assigned as error. On page 402 the court says:

> "It is said the instruction directed to the first count should have been given because that count fails to allege in what respect defendant was negligent, and that the second, fourth and fifth should have been given because the counts to which they were directed fail to disclose any right in the plaintiff to use the crossing. *Error in refusing to*

instruct a jury to disregard certain counts in a declaration is harmless where there is one good count in the declaration to which the evidence is applicable and which is sufficient to sustain the judgment. Conceding these counts were subject to the criticisms urged, the fifth count, which was good and to which no objection is made, *will sustain the judgment. (Chicago and Alton Railroad Co.* v. *Anderson,* 166 Ill., 572; *Consolidated Coal Co.* v. *Scheiber,* 167 id., 539; *Illinois Central Railroad Co.* v. *Weiland,* 179 id., 609.)"

In the case of *Swift & Co.* v. *Rutkowski,* 182 Ill., 18-22-23-24, the declaration consisted of five counts and a motion was made by defendant to exclude from the consideration of the jury three of these counts on the ground of variance between the declaration and the evidence, which motion the court overruled. Beginning on page 22, the Supreme Court says:

"Moreover, *the plaintiff did not rely exclusively on the counts objected to,* but relied on other counts of the declaration under which it is not pretended the evidence was inadmissible. If the evidence was admissible under any one count of the declaration it could not be excluded. The rule laid down in *Chicago, Burlington and Quincy Railroad Co.* v. *Warner,* 108 Ill., 538, applies here. It is there said (p. 548): 'It is also contended the plaintiff failed to prove his case as laid in the declaration, and that the court therefore erred in not excluding the evidence from the jury. We do not concur in this view. The *mistake* of appellant on this branch of the case is in assuming that appellee bases his right of recovery exclusively upon "the original improper construction of the car." It is true the declaration proceeds upon this theory, *but not upon this theory alone,* for, as already shown. it is expressly averred in the amended declaration that it was the duty of the defendant "to furnish for the use of its employes

properly and carefully constructed cars, with end ladders, side handles and steps attached thereto," and the declaration further on expressly negatives the performance of this duty. *This being so, the plaintiff was not bound, at his peril, to prove both branches of his case. It was sufficient if he proved either.* It is familiar doctrine of the law that all torts are severable, and, therefore, *in an action ex delicto, it is immaterial that all the averments of the declaration are not proved as laid. It is sufficient if such of them as are so proved show a good cause of action.'* * * *

It is also claimed that the court erred in refusing to instruct the jury to disregard the second additional count of the declaration, filed January 28, 1896, and the second and fourth additional counts filed July 15, 1897. It is conceded that the declaration contains one or two counts which are good and to which the evidence is applicable, and that these counts, or one of them, are sufficient to sustain the judgment. *Where such is the case, it was expressly held in Consolidated Coal Co. of St. Louis* v. *Scheiber*, 167 Ill., 539, *that the refusal of the court to instruct the jury is not reversible error.* The same rule was declared in *Chicago and Alton Railroad Co.* v. *Anderson*, 166 Ill., 575, and the rule established in those cases must control here."

In the case of *C. & A. R. R. Co.* v. *Harbur*, 180 Ill., 394-396, the declaration consisted of three counts. At the close of the evidence motions were made to instruct the jury to find for the defendant and also a motion in arrest of judgment. The court finds that there was *no evidence* introduced tending either to prove or disprove certain allegations in the declaration, but the court says on page 396:

"The common law rule is changed by statute providing that where an entire verdict shall be given on several counts the same shall not be set

> aside or reversed on account of any defective count if one or more of the counts in the declaration are sufficient to sustain a verdict. *Shreffler* v. *Nadelhoffer*, 133 Ill., 536."

In the case of *I. C. R. R. Co.* v. *Weiland*, 179 Ill., pages 609, 614, the declaration contained six counts and it was contended that the evidence was insufficient to support certain of the counts. The court says, on page 614:

> "Instructions were asked by the defendant to the jury to disregard each of the counts in the declaration, and were refused. Appellant contends that in this the court erred, and especially as to some of the counts. As we have seen, the third, fourth and sixth counts *were sufficient*, and if it were held the instructions applicable to the first, second and fifth should have been given, *the error could not operate to reverse the judgment. Consolidated Coal Co.* v. *Scheiber*, 167 Ill., 539."

In the case of *Consolidated Coal Co.* v. *Scheiber*, 167 Ill., 539, the declaration contained six counts. To each of these counts the defendant requested an instruction to the jury to disregard the said counts. The court gave the instruction applicable to the sixth count, *but refused to give those referring to the first five counts.* It is contended that all the counts were faulty and that it was the duty of the court to instruct the jury to disregard them. The court in its opinion (p. 541) discusses the fourth and fifth counts and says:

> "From the view we take of the case *it is unnecessary to examine the other counts of the declaration, for if there is one good count to which the evidence was applicable and which is sufficient to sustain the judgment, the error of the court, if any, in refusing to instruct the jury to disregard the other counts becomes harmless.* It could not

in reason be said that the defendant occupied any better position than it would had it filed a general demurrer to each count and refused to plead further; and it has been decided by this court, under the statute, that where a defendant abides by his general demurrer which has been overruled to each of several counts, and final judgment has been rendered for the damages as assessed, the judgment will not be reversed because the court erred in overruling the demurrer to some of the counts, *if one of the counts is good and the evidence upon which the damages were assessed is applicable to such good count.* (*North* v. *Kizer*, 72 Ill., 172. See, also, *Shreffler* v. *Nadelhoffer*, 133 Ill., 536; *Chicago and Eastern Illinois Railroad Co.* v. *Hines*, 132 id., 161; *Anderson* v. *Semple*, 2 Gilm., 455.)" * * * (p. 543.)

"The rule at common law was, that although there were good counts in the declaration, yet if there was one bad count the judgment would be arrested. But that rule applied only where such bad count was insufficient to support the judgment, and not where it would have been held merely defective in stating the cause of action. Our statute has so far changed that rule that *where there is an entire verdict on several counts it shall not be set aside or reversed because the declaration contains a defective count, if there be one or more counts sufficient to sustain the verdict.*"

In the case of *C. & A. R. R. Co.* v. *Anderson*, 166 Ill., 572, 575, the defendant asked instructions to the jury as to the first, second, third and fourth counts of the declaration, directing them to disregard such counts and the court refused to give such instruction. The Supreme Court says (page 575):

"The first, second, third and fourth instructions in substance directed the jury to disregard the first, second, third and fourth counts of the decla-

ration. Section 51 of the Practice Act provides, that if one or more of the counts of a declaration are faulty, the defendant may apply to the court to instruct the jury to disregard such faulty counts. We are not prepared to hold that the counts are so insufficient as not to support the judgment, and if they are not sufficient, the defects could not be reached by the instruction. *But if the counts were so defective that they would not support the judgment, the error in refusing the instructions, if error it was, was harmless as the declaration contained five counts, and it is not claimed that the fifth count is insufficient.* If there is *one* good count to which the evidence was applicable and which is sufficient to sustain the judgment, the error of the court, if any, in refusing to instruct the jury to disregard the other counts, *becomes harmless.*"

In the case of *Illinois Steel Co.* v. *Schymanowski*, 162 Ill., pp. 447, 457-458, the declaration consisted of three counts. The defendant requested an instruction to the jury requiring them to find for the defendant upon the first count of the declaration. The court instructed the jury that there was no evidence of certain allegations contained in the count to the effect that defendant promised to furnish an additional light and did not perform its promise, and it was then contended by defendant that what remained of the count did not state a legal cause of action. The Supreme Court says:

"Even if this were so, the second and third counts each disclose a legal cause of action, and both are sufficient to sustain the judgment. The verdict is an entire one, not limited to the first count. This being so, Section 57 of the Practice Act is applicable, which provides, that 'Whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of

the counts in the declaration be sufficient to sustain the verdict.' (2 Starr & Curtis Stat., p. 1822.)

Counsel insist that, by the modified instruction, the jury were permitted to regard the remainder of the first count, after eliminating therefrom the allegation of a promise, as still being a part of the declaration, and that the promise and reliance thereon were so much a part of the first count as to make a recovery upon what was left of it impossible. In other words, it is insisted that the allegation as to the promise cannot be regarded as surplusage. We are unable to agree with this contention. The plaintiff may aver in his declaration as many grounds of recovery as he sees proper, *but it is not necessary to prove all that is alleged. It is sufficient to prove enough of the negligence charged to make out a case.* (*New York, Chicago and St. Louis Railroad Co.* v. *Blumenthal*, 160 Ill., 40.) Where a servant sued his master for a personal injury while engaged in service, and alleged two grounds of actionable negligence, namely, negligence in failing to remedy a defect in the floor of the shop where the plaintiff was employed, and negligence in failing to perform a promise to place guards over certain knives used in the shaping of materials, we said: 'The fact, * * * that plaintiff failed to prove that defendant promised * * * to remedy the defect of the machine in regard to guards over the knives, *did not preclude a recovery on the ground of other negligence relied upon and sustained by the evidence.*' (*Weber Wagon Co.* v. *Kehl*, 139 Ill., 644.) So in the case at bar, the first count charges negligence upon the ground that the defendant did not have and keep the sides of the pile of ore of such shape and so supported, that the ore would not fall down and injure the persons at work near the pile, and also upon the ground that defendant did not perform its promise to furnish more light to work by; but *the fact that plaintiff failed to prove the promise to furnish more light, does not preclude*

a recovery upon the other ground of negligence in failing to keep the sides of the pile of ore in a safe condition."

In the case of *N. Y. C. & St. L. R. R. Co.* v. *Blumenthal,* 160 Ill., 40-47, the declaration consisted of four counts. The defendant requested the court to instruct the jury that the evidence was insufficient to maintain the plaintiff's case as charged in the declaration, but the court held that the evidence sufficiently supported certain of the allegations of the declaration, and says. (p. 40.)

> "The plaintiff may aver in his declaration as many grounds of recovery as he sees proper, but *it is not necessary to prove all that is alleged. It is sufficient to prove enough of the negligence charged to make out a case.* (*Weber Wagon Co.* v. *Kehl,* 139 Ill., 644.)"

In the case of *Weber Wagon Co.* v. *Kehl,* 139 Ill., 646-657, the declaration consisted of two counts, one containing averments that the defendant had promised or agreed to place guards over certain knives of a machine called a shaper. The court says (p. 656):

> "On the trial, plaintiff introduced evidence tending to prove the allegations of the declaration, *except* the averment that the defendant promised or agreed to place guards over the knives of the shaper. *As to this averment no proof whatever was introduced,* and on account of a failure to introduce any proof upon this question the defendant claims no recovery can be had, and the court erred in refusing its first instruction, as follows: 'The court instructs the jury, that under the pleadings and proofs in this case the plaintiff is not entitled to recover, and you should find for the defendant.' *The plaintiff had the right to aver in his declaration as many grounds of recovery as he*

saw proper, but it was not necessary to prove all that was alleged. It was sufficient to prove enough of the negligence charged to make out a case.''

In the case of *Pennsylvania Company* v. *Backes,* 133 Ill., 255-259-260, the court says:

''The next error complained of is, that the plaintiff's first and third instructions allowed a recovery under any one of the four counts of the declaration, *three of which are believed to be inapplicable,* to the case as made by the evidence. The first count of the declaration charged the defendant with running the car which resulted in the injury, at a high and unlawful rate of speed, and with negligently driving the same against the plaintiff. The second charged the defendant with a violation of a section of our statute which requires the blowing of a whistle or ringing of a bell at a distance of eighty rods from highway crossings. The third charged a violation of the city ordinance in failing to ring a bell or blow a whistle The fourth charged that the coal car was running at a greater rate of speed than six miles an hour, contrary to the ordinances of the city.

The substance of the charge complained of is, that if the jury believe, from the evidence, that the plaintiff, without fault or negligence on his part, was injured by the wrongful acts of the defendant company, as alleged by the plaintiff in his declaration, then they should find the defendant guilty. *We shall not stop to inquire whether the second, third and fourth counts were sustained by the evidence introduced under them. Even if they were not, a recovery might be had under the first count.* The instruction complained of could not mislead the jury.

In *Hannibal and St. Joe Railroad Co.* v. *Martin,* 111 Ill., 219, where an instruction directed the jury, that if the plaintiff was injured in manner and form as alleged in the declaration, or some count thereof, the jury should find the defendant

guilty, it was there, as here, urged that the instruction was erroneous, because the court should not have submitted the question of plaintiff's right to recover under the third and fourth counts of the declaration, to the jury, because there was *no evidence* that the accident happened in the manner therein stated. The court held the instruction good, and said: 'It was the privilege of appellant to call the attention of the jury to the different allegations of the several counts, if it chose to do so; but it is sufficient if the law, as laid down at the instance of appellee, is correct, and applicable to the case under *either count.*'

It is not claimed that plaintiff could not recover under the *first count* of the declaration, if the jury found, from the evidence, the facts as stated in the charge. Nor is it claimed that the instruction is erroneous as to that count of the declaration, and under the ruling in the case cited, the instruction cannot be held to be erroneous. See, also, *Pennsylvania Co.* v. *Frana,* 112 Ill., 403."

In the case of *H. & St. J. R. R. Co.* v. *Martin,* 111 Ill., 220, the 6th section of the syllabus reads as follows:

"In an action by a passenger against a railroad company to recover for a personal injury, two counts of the declaration charged a liability for a failure to make up the train and sufficiently to couple its cars, while the other two charge the negligence to be the moving the engine and cars attached thereto without sufficiently and securely coupling the cars. Held, that proof of *either ground* was sufficient to authorize a recovery, and that an instruction embracing this principle was not erroneous."

In the case of *Johnston* v. *McNiff,* 113 Ill. App., pp. 1-3, the declaration consisted of seven counts and it was insisted that the sixth and seventh counts were faulty. The court says, p. 3:

"It is not questioned that the first five counts

were good, nor that the evidence was applicable thereto. The fifty-seventh section of the Practice Act provides that 'whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict.' *We deem it unnecessary to determine* whether or not said sixth and seventh counts were so faulty as to be sufficient to sustain a verdict, for even if they were, there being five good counts, and the instruction being general as to the whole declaration, was properly given. *Consolidated Coal Co.* v. *Scheiber,* 167 Ill., 539; *C. & A. R. R. Co.* v. *Anderson,* 166 Ill., 572; *H. & St. J. R. R. Co.* v. *Martin,* 111 Ill., 219; *Schreffler* v. *Nadelhoffer,* 133 Ill., 536; *Franklin Printing Co.* v. *Behrens,* 181 Ill., 340; *Pennsylvania Co.* v. *Backes,* 133 Ill., 255."

See, also:

Franklin Printing Co. v. *Behrens,* 181 Ill., 340.

Gebbie v. *Mooney,* 121 Ill., 255.

Chicago Union Traction Co. v. *Kallberg,* 107 Ill. App., 90, 92, 93.

St. L. & T. H. R. R. Co. v. *Eggman,* 60 Ill. App., 291-295.

East St. Louis Connecting Railway Co. v. *Shannon,* 52 Ill. App., 420-423.

We respectfully submit that in view of the foregoing authorities the trial court did not commit reversible error in refusing to instruct the jury to disregard the counts of the declaration complained of and in so refusing merely followed the usual and customary practice of this state. In this connection we desire to draw the attention of the court to the case of *Maryland* v. *Baldwin,* 112 U. S., 490, cited in the opinion of the

court in this case. In the first place that case was not an action in tort where, as the Supreme Court of Illinois has repeatedly held, the tort is severable and can be alleged in as many different forms and in as many different counts as the pleader chooses to set it forth, and that *it is never necessary to prove all the charges as laid.*

In the Maryland case five pleas were filed by the defendants; the first plea tendered an issue which if decided in favor of defendants *was conclusive of the case. Incompetent evidence was admitted bearing directly on this issue* and the verdict being general and in favor of defendants, the court could not determine whether or not this incompetent evidence had influenced the jury in finding for the defendants under the issue raised by the aforesaid plea.

In the case at bar *it is not claimed that improper evidence was introduced,* but simply that the evidence did not prove that certain violations of the statute charged in three of the counts tended proximately to cause the death of Fulton. Whether or not the second, third and sixth counts of the declaration were proved *is not a controlling factor in this case.* As long as there were admittedly five good counts under which competent and proper proof was made it is sufficient to sustain the action.

If this case is remanded to the trial court for another trial and the three counts complained of are dismissed from the declaration the result of the trial could be nothing less than a verdict in favor of defendant in error as every controlling question of law has been decided on the two appeals of this case and the third

trial would amount to nothing more than an assessment of damages which as assessed in this case are certainly not excessive.

The record shows that Samuel Fulton was killed on January 27th, 1901, leaving defendant in error, his widow, and a family of small children, and that the widow is without means and is suing in this case for loss of support suffered by herself and children as a consequence of the untimely death of her husband. If the final determination of this case is further delayed it will cause great hardship to her.

We respectfully pray the court to reconsider this case and the authorities herein cited.

Respectfully submitted,

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